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In The

Supreme Court of the United States

October Term, 1964

No. 853

THOMAS STERGER and LOUIS KLEIN,

Petitioners,

v.

THE STATE OF WISCONSIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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I. OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Wisconsin is reported in *State v. Klein,* (1964) 25 Wis. 2d 394, 130 N. W. 2d 816.

II. JURISDICTION.

Respondent opposes the granting of a writ of certiorari on the ground that the facts of this case do not present any substantial federal question of denial of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

Furthermore, the petitioners are presenting a question for review to this Court which was not presented to the court below. This is violative of proper legal procedure and for that reason it is respectfully submitted that this Court should not assume jurisdiction on that question until such time as the court below has an opportunity to rule on such question.

III. NATURE OF THE CASE.

Petitioner seeks review of a judgment of the Supreme Court of Wisconsin affirming a judgment of the Circuit Court, Criminal Division, Branch No. 11, of Milwaukee county, whereby the petitioners were convicted of the crime of theft. A jury trial was waived and the court found the petitioners guilty of theft and sentenced each of them to twelve years in the Wisconsin state prison.

The petitioners present the following questions for review, to wit:

(1) May two individuals be arrested without a warrant by police officers of one state who have received a teletype message from police officers in another state claiming that the two individuals were suspected of committing a felony in such other state? The petitioners claim that this constitutes an unlawful arrest since there was no formal charge pending against the two individuals in the state where the felony was allegedly committed when the teletype message was sent. The Supreme Court of Wisconsin held that the arrest was lawful.

(2) May a police officer in another state who receives an order from his police radio dispatcher to arrest

certain described individuals who are wanted in another state for committing a felony, arrest such individuals without a warrant? The Supreme Court of Wisconsin held that this was a lawful arrest.

(3) May items which were obtained from a search of the coat of one of two individuals arrested be introduced in evidence if such search was made 18 hours after the initial arrest even though the coat was in the possession of the police department from the time of the arrest? The circuit court permitted such items to be introduced into evidence. The petitioners did not ask the Supreme Court of Wisconsin to review this ruling of the lower court.

IV. STATEMENT OF FACTS.

The facts herein presented are those which appear as the statement of facts reported in the decision of the Supreme Court of Wisconsin, *State v. Klein, supra:*

> On June 27, 1962, the Milwaukee police department sent a teletype message to the Detroit headquarters of the Michigan state police. The message stated that there had been a $100,000 jewelry theft in Milwaukee that day and that the persons involved had parked their 1960 maroon Oldsmobile at the Detroit metropolitan airport bearing an Ohio license plate, the number of which was given. The message also gave the names of the two defendants and their descriptions and stated that defendants were wanted in Milwaukee for this theft. Officers of the Michigan state police found the described Oldsmobile car parked at the airport. They placed the car under surveillance

and the next day arrested the two defendants as they were about to enter it.

Incidental to the arrest defendants were searched and a watch and ring stolen in the theft were found on Sterger. An incriminating bag of keys was found in his luggage. The warrants for the arrest of defendants were not issued in Milwaukee until June 29, 1962, the day following their arrest. Before trial defendants moved that the articles seized as a result of the search made incidental to arrest be suppressed, and such motion was denied.

Defendants waived a jury trial, and trial was had to the court. The seized articles were admitted in evidence over the objection of defendants. The court found defendants guilty. Judgment was entered September 26, 1963, and defendants were sentenced to indeterminate terms of not more than twelve years. Defendants have appealed.

Further facts will be stated as they affect the individual questions presented to this Court.

V. ARGUMENT.

A. THE ARREST OF THE TWO PETITIONERS WAS A LAWFUL ARREST.

The following uncontroverted facts are reiterated here to show that the arrest was lawful.

On June 26, 1962, a theft of an automobile containing a valuable quantity of jewelry was committed in the city and county of Milwaukee, Wisconsin.

On June 27, 1962, the Milwaukee police department sent a teletype message to the Detroit headquarters of the

Michigan state police. The message contained the following information:

(1) There had been a $100,000 jewelry theft in Milwaukee on June 26, 1962;

(2) The persons suspected of the crime had parked their 1960 maroon Oldsmobile at the Detroit airport;

(3) The automobile bore an Ohio license plate;

(4) The license number, names and description of the two suspects were given; and

(5) The two suspects were wanted in Milwaukee for theft.

Detective Sergeant George Craft of the Michigan state police was dispatched via radio to the Detroit Metropolitan Airport. He was given the above information. The 1960 maroon Oldsmobile bearing the described Ohio license plates was located at the airport and put under surveillance. Two individuals answering the description contained in the teletype message proceeded to enter the automobile. Sergeant Craft asked them if their names were Louis Klein and Thomas Sterger, and they informed him that they were. They were arrested by Detective Craft based on the information he had received from his dispatcher.

The legality of the arrests in the case at bar is controlled by Michigan law since Michigan is the state where the arrests took place. *United States v. Di Re,* (1948) 332 U. S. 581, 68 Sup. Ct. 222, 92 L. ed. 210.

Sec. 764.15, Mich. Comp. Laws, (1948) (Mich. Stats. Anno. 28.874 Sec. 15) provides in part:

> Any peace officer may, without a warrant, arrest a person . . .
>
> (e) When he has *received positive information by written, telegraphic, teletypic, telephonic, radio or* other authoritative source that another officer holds a warrant for such arrest; (Emphasis supplied)
>
> (f) When he has received *such positive information broadcast from any recognized police or other governmental radio station,* or teletype as may afford him *reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it.* (Emphasis supplied)

The above statute makes no distinction between the arrest of one in the state of Michigan who has committed a crime in another part of that state, and one who is arrested in the state of Michigan but who committed a crime in another state.

At common law, when a felony was committed in one state, a peace officer of another state could validly arrest without a warrant a person suspected of having committed such felony if reasonable grounds existed for the officer's belief that the arrested person is the one who committed the crime.

> *Burton v. New York Cent & H. R. R. Co.,* (1911) 147 App. Div. 557, 132 N. Y. Supp. 628, affirmed without opinion, (1912) 210 N. Y. 567, 104 N. E. 1127, and latter judgment affirmed (1917), 245 U. S. 315, 38 Sup. Ct. 108, 62 L. Ed. 314;

People v. Euctice, (1939) 371 Ill. 159, 20 N. E. 2d 83;

Malcomson v. Scott, (1885) 56 Mich. 459, 23 N. W. 166.

No Michigan decision has held that sec. 764.15, Mich. Stats. Anno. *supra,* refers only to arrests made in Michigan as a result of a crime committed in Michigan. Therefore, in the absence of statute or a ruling by the courts, the common-law rule prevails. Therefore, sec. 764.15, Mich. Comp. Laws, applies where an arrest is made in Michigan as a result of a crime committed either in Michigan or in any other state.

In the court below, the petitioners relied on *Malcomson v. Scott, supra.* In that case the court held that an arrest made by police officers in Michigan of a fugitive from Pennsylvania was unlawful. However, the Michigan court held the arrest without a warrant unlawful because a letter from the chief of police of Philadelphia, which was basis for the arrest, did not bear his personal signature and failed to establish that a felony had been committed in Philadelphia. Actually the letter from Pennsylvania failed to identify anyone as the sender. The court below cited the *Malcomson* case, *supra,* to the effect that if the chief of police has personally signed the letter and had recited facts sufficient to show that a felony had been committed, the arrest would have been legal. In the case at bar, all such elements were presented to the Michigan state police through the communication from Milwaukee, Wisconsin.

The determination of whether the arrest was lawful should be decided upon the facts in the mind of the arresting officer at the time of the arrest. That arrest was made at the airport by Detective Sergeant Craft. It must be shown that he had probable or reasonable cause to make the arrest.

Probable or reasonable cause has been defined in Michigan in *Hammitt v. Straley*, (1953) 338 Mich. 587, 61 N W. 2d 641, as follows:

> 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. Yet probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances which would be sufficient to induce a reasonable belief in the truth of the accusation'. P. 644

Sgt. Craft's actions were based on information received from Michigan state police headquarters radio. The information included a positive announcement that certain persons, who were described, were wanted in Milwaukee for a $100,000 jewelry theft. Clearly, this constituted a reasonable ground of suspicion—when "supported by [such] circumstances" as the appearance of two of the persons described at an automobile bearing Ohio license plates parked on the lot of a Detroit airport within close air range to Milwaukee—upon which to base a valid and legal arrest.

Reliance by police officers on information received over police radio systems, as a basis for arrest without a warrant, has been ruled justifiable.

Silver v. State, (1928) 110 Tex. Cr. 512, 8 S .W. 2d 144, 60 A. L. R. 290;

Scaffido v. State, (1934) 215 Wis. 389, 254 N. W. 651;

People v. Wilson, (1962) 229 N. Y. S. 2d 685;

Richardson v. State, (1953) 97 Okla. Cr. 370, 264 P. 2d 371.

In the *Scaffido* case, *supra,* in a discussion of probable cause, the court referred (at p. 393) to the *Silver* case, *supra,* and stated that:

> 'In connection with defining probable cause . . . it was held . . . that information received by a police officer over the radio as to commission of a crime and the description of the offenders is sufficient probable cause, when coupled with discovery of persons answering the description, to justify a search without a warrant of the automobile in which they were traveling.'

It is necessary to discuss three leading decisions of this Court that have a direct relationship to the case at bar:

Ker v. California, (1963) 374 U. S. 23, 83 Sup. Ct. 1623, 10 L. ed. 2d 726;

Draper v. U. S., (1959) 358 U. S. 307, 79 Sup. Ct. 329, 3 L. ed. 2d 327;

Beck v. Ohio, (1964) 379 U. S. 89, — Sup. Ct. —, 13 L. ed. 2d 142.

Considering these three cases in light of the factual situation presented in the case at bar, it is respectfully submitted that the inescapable conclusion is that the arrest made in the case at bar was not only lawful but was in obvious recognition of the principles laid down by this Court.

In the *Ker* case, *supra*, this Court said, at pp. 34, 35:

> The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists "where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

After reciting the aforementioned principle, this Court then went on to analyze the facts of which the arresting officers had knowledge at the time of the arrest. This Court then cited *Draper v. United States, supra:*

> [W]e held that information from a reliable informer, corroborated by the agents' observations as to the accuracy of the informer's description of the accused and of his presence at a particular place, was sufficient to establish probable cause for an arrest without warrant. P. 36.

In the *Ker* case, *supra*, the arresting officers were told by a reliable informer that Ker was selling narcotics from his apartment. Ker was seen on the night of the arrest in the company of one Ronnie Murphy who was known to be a large-scale seller of marijuana and who was out on bail in connection with narcotics charges. Ker returned to his apartment where the arrest was subsequently made.

This Court held that probable cause was shown to warrant an arrest.

In the *Draper* case, *supra,* a reliable informer told federal narcotic agent Marsh that Draper was peddling narcotics to several addicts in Denver, Colorado. The informer told Marsh that Draper had gone to Chicago and would be returning on the morning train to Denver on September 8 or 9, 1962, with a supply of heroin. He gave Marsh a detailed description of Draper and of the clothing he was wearing and said that he would be carrying a tan zipper bag and that he habitually walked real fast.

Marsh arrested a man fitting this description at the Denver Union Station on the morning of September 9th. Draper argued that there was no probable cause on which to base the arrest. This Court held that probable cause was shown:

> Nor can we agree with petitioner's second contention that Marsh's information was insufficient to show probable cause and reasonable grounds to believe that petitioner had violated or was violating the narcotic laws and to justify his arrest without a warrant. The information given to narcotic agent Marsh by "special employee" Hereford may have been hearsay to Marsh, but coming from one employed for that purpose and whose information had always been found accurate and reliable, it is clear that Marsh would have been derelict in his duties had he not pursued it. And when, in pursuing that information, he saw a man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that Hereford had described, alight from one of the very trains from the very place stated by Hereford and start to walk at a "fast" pace toward the station exit, Marsh

had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified. Marsh had "reasonable grounds" to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true. P. 312, 313.

In the *Beck* case, *supra*, this Court stated at page 91:

> Whether that arrest was constitutionally valid depends in turn upon whether at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

This Court held in the *Beck* case, *supra*, that probable cause was not shown to warrant an arrest. Police officers observed Beck driving his car. They then accosted him, identified themselves, and told him to pull over to the curb. They placed him under arrest, searched his car but found nothing of interest. They then took him to a nearby station, searched his person and found an envelope containing a number of clearing house slips.

This Court in reviewing the record, which it described as "meager," said:

> As to the officer's own knowledge of the petitioner before the arrest, the record shows no more than that the officer "had a police picture of him and knew what he looked like," and that the officer knew that the peti-

tioner had a record in connection with clearing house and scheme of chance." P. 93.

Beyond that, the officer testified only that he had "information," that he had "heard reports," that "someone specifically did relate that information," and that he knew what that person was. There is nowhere in the record any indication of what "information" or "reports" the officer had received, or, beyond what has been set out above, from what source the "information" and "reports" had come.

Petitioners in the case at bar submit that the *Beck* case, *supra*, governs. Any attempt to draw an analogy between the factual situation in the *Beck* case and the case at bar is impossible.

Considering the *Ker*, *Draper* and *Beck* cases, *supra*, the conclusion that the arrest in the case at bar was based on probable cause is inescapable. The informer in the case at bar is the Milwaukee police department in the first instance. They inform the Michigan state police that two men who will arrive at the Detroit Metropolitan Airport and proceed to get into a maroon 1960 Oldsmobile bearing Ohio license plates are wanted in Milwaukee, Wisconsin, for a $100,000 jewelry theft. A vivid description of both men is given. Subsequently Detective Sergeant Craft of the Michigan state police is informed of all these facts over his police radio. He proceeds to the airport and finally sees two men, answering the description in every detail, come out of the terminal and go to a maroon 1960 Oldsmobile bearing Ohio license plates. They start to get in the car and at that time Detective Sergeant Craft asks them if they are Louis Klein and Thomas Sterger. They admit that they are. He then arrests them. Therefore, as

to Craft, the "informer" is the Michigan state police. (See Sec. 764.15 Mich. Comp. Laws, *supra*). Clearly probable cause as defined by this Court exists and, therefore, the arrest is lawful.

B. THIS COURT SHOULD NOT CONSIDER THE CONTENTION THAT THE SEARCH WAS NOT INCIDENTAL TO ARREST.

This question was not presented to the Supreme Court of Wisconsin. However, the petitioner argued before the trial court that evidence of jewelry found via the search of the coat of one of the two petitioners the day after the arrest should not be allowed into evidence even though the coat was in possession of the Michigan state police from the time of the arrest. The trial court did not agree. The question was not subsequently presented to the state Supreme Court on appeal.

In *Ker v. California, supra,* where the police without a search warrant searched the automobile of Mrs. Ker on the day subsequent to her arrest, this Court said:

> Ordinarily "[W]e do not reach for constitutional questions not raised by the parties," *Mazer v. Stein,* 347 U. S. 201, 206, N 5 (1954)" nor extend our review beyond those specific federal questions properly raised in the State Court. The record gives no indication that the issue was raised in the trial court or in the District Court of Appeal, the latter court did not adjudicate it and we, therefore, find no reason to reach it on the record. p. 43, 44.

This Court will not determine the rules by which the state should be governed in the area of search and seizure.

This Court enunciated in *Ker v. California, supra*, that it will only determine whether the rules governing search and seizure in the different states are reasonable. Therefore, unless the court below had an opportunity to apply its law on search and seizure to the factual situation in the case at bar, there is nothing for this Court to review. Since the petitioners failed to present that question to the court below, they may not now ask this court to determine whether there was a reasonable search.

VI. CONCLUSION.

It is respectfully submitted that the arrest without a warrant of the petitioners was based on probable cause and that the petition for a writ of certiorari be denied.

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Attorneys for Respondent.

AFFIDAVIT OF SERVICE

STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)

PEARL M. RILEY, being first duly sworn on oath deposes and says:

1. That she is a stenographer employed in the Office of the Attorney General of Wisconsin;

2. That on February 23, 1965 she served a copy of the within Brief of Opposition to Petition for Writ of Certiorari by depositing the same in the United States Post Office at Madison, Dane County, Wisconsin, securely enclosed in an envelope, first class postage duly prepaid, addressed to the following attorney of record for the Petitioner, at his Post Office address as stated below:

Mr. Dominic Frinzi
Attorney at Law
161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

.....

Subscribed and sworn to before me
this 23rd day of February, A. D. 1965.

(SEAL)

.....
Notary Public, Dane County, Wisconsin.

My Commission expires: .....